Nos. [illegible] and 663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NACIREMA OPERATING CO., INC. AND LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY,

Respondents.

JOHN P. TRAYNOR AND JERRY C. OOSTING, DEPUTY COMMISSIONERS,

Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF AMERICAN TRIAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

American Trial Lawyers Association
Admiralty Section

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BRIEF ON BEHALF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION

TO THE HONORABLE JUDGES OF THE COURT:

CONSENT OF THE PARTIES

All of the parties in these causes have given their written consent to the filing of this brief *Amicus Curiae.*

Statement of Interest of the *Amicus Curiae*

The American Trial Lawyers Association, is a national bar association, consisting of more than 20,000 lawyers, primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys represent members of the merchant marine and other maritime workers who are engaged in a hazardous industry and are recognized as having a special status both by legislation and generally in the courts of the land. All of these maritime workers have a real and direct interest in the outcome of this appeal.

Said Association is vitally concerned in the final outcome of this case involving as it does a situation which may finally resolve the tortuous series of cases which have attempted for over a generation to make a clear line by which attorneys and injured maritime workers will know their rights. It is a question of serious importance since 25% of all longshoremen's injuries occur on docks and piers, and in most states the average compensation is but half the federal rate. Only a broad interpretation of the Federal Act will protect these men as Congress intended.

A resolution of the issues in this case will materially affect not only the financial plight of injured maritime workers, but is of paramount importance to hundreds of thousands of workers, to the admiralty bar, and to the

maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief *Amicus Curiae*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 528 and 663

NACIREMA OPERATING CO., INC. AND LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY,

Respondents.

BRIEF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

Questions Presented

1. Whether an injury sustained by a longshoreman caused by ship's gear on a pier or dock over navigable waters is within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

2. Whether the Longshoremen's Act is operable to the widest extent of federal concern and power.

3. Whether coverage in this case will present problems in applying the Longshoremen's Act in other cases, or will provide a logical and certain rule of law with justice.

Statement of the Case

Rather than repeat an extensive Statement, Amicus American Trial Lawyers Association will adopt Petitioners' statement as it appears in their Petition for a Writ of Certiorari, and in the Opinion of Circuit Judge Sobeloff below.

Suffice it to say that Johnson and Klosek were members of a longshore gang and were injured on a gondola car on a pier while loading steel beams aboard ship. The vessel's cranes picked up a draft which swung when raised, and caused injuries to both and from which Klosek died.

Avery was also aboard a gondola car on a pier and was injured by a swinging draft hooked to a ship's gear.

It was stipulated that the piers in question were over water and high enough to permit barges and small boats under them. The injuries occurred several hundred feet from land.

This Court is being called upon to settle the issue as to whether the Longshoremen's Act is applicable to accidents within Congressional power over admiralty and maritime accidents. In addition, this Court is being asked to decide whether the Longshoremen's Act and Congressional power is co-extensive with maritime contracts and interstate commerce powers thereby including an injury to a longshoreman by ship's equipment on a dock erected over navigable water.

It has been statistically demonstrated that about 25% of all injuries to maritime employees occur on docks and piers while ships are being loaded, unloaded, or repaired.

Awards under the Federal Act are typically twice the amount given under most state acts.

To overturn the decisions below is to withdraw a significant number of maritime accidents from the reach of federal concern contrary to the intent of the Congress.

I. The Longshoremen's Act Extends To The Limit Of The Admiralty Jurisdiction And Congressional Power.

A review of the Supreme Court decisions since *Southern Pacific Co.* v. *Jensen* (1917), 244 U. S. 205 leads to the analysis that the Longshoremen's Act fulfills the Federal concern to the limit of Congressional power.

Jensen limited a *state's* power to the water's edge; a state compensation act was held inapplicable to an injury and death on a gangplank. However, *Jensen* (at p. 217) makes it clear that the *Federal* jurisdiction does not begin at the water's edge. The decision states without equivocation that there is Federal concern for any stevedoring activity; it involves a maritime contract of employment; by its very nature it is a maritime engagement; it affects "navigation between the states and with foreign countries . . .".

Thereafter commenced the series of cases to limit the rigidity of *Jensen* by establishing a rule of "local" concern to allow a state compensation act to apply to certain maritime injuries. But these cases were not limitations on Federal power which at the time was not exercised.

It was in this context that the Longshoremen's Act was debated and passed by Congress. Thereafter, the jurisdiction of admiralty was clarified by passage of the Extension in Admiralty Act; not to create new causes of action but to make American admiralty practice clearly in accord with the law of England and other foreign countries.

Even before the passage of the Extension in Admiralty Act in 1948, the Supreme Court had determined that the maritime jurisdiction would reach dock areas where maritime personnel was injured in activities related to a vessel.

In *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U. S. 36, decided in 1943, a crew member was injured while a repair was being made on a connection to a land pipe, used in discharging a ship's cargo. The injury occurred on "land" but the seaman recovered under the Jones Act against his employer.

More recently, this Court has acknowledged in *Calbeck* v. *Travelers Insurance Co.* (1962), 370 U. S. 114 that in passing the Longshoremen's Act, "Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter", and that ". . . Congress intended the compensation act to have a coverage coextensive with the limits of its authority".

Calbeck dealt with the application of the Federal Act to a welder engaged in "new" ship construction, as opposed to the suggested exclusive remedy of state compensation. The Court cited extensively language from *DeBardeleben Coal Corp.* v. *Henderson* (5th Cir. 1944), 142 F. 2d 481, at page 130 of 370 U. S.

The wide application of the rule that the Longshoremen's Act is co-extensive with federal maritime jurisdiction is underlined by *Boston Metals Co.* v. *O'Hearne,* D. C. Md. Adm. #4412, unreported opinion, June 20, 1963, aff'd (4th Cir. 1964) 329 F. 2d 504, cert. den. 379 U. S. 824. In that case a widow of a welder who as killed on a decommissioned hulk was held entitled to collect under the Act. The hulk was fast aground and in the process of being scrapped. District Judge Winter in the unreported opinion to this case stated:

> "I think the *Calbeck* case equates, I think the legislative history (of the Longshoremen's Act) supports,

and I think the decisions in this Circuit also support the concept that *navigable waters* of the United States *means the admiralty jurisdiction of the United States, wherever it may be from time to time.*

• • • I think that the *Calbeck* case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' *Act was not to be frozen* to the *admiralty jurisdiction* of the United States as it then existed *in 1927* or as it was *considered then* to *exist* but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under *subsequent legislation or,* as a result of *subsequent court decisions,* the admiralty jurisdiction of the United States is being expanded and the application of the *Longshoremen's* and Harbor Workers' *Act expands along with it.*"

As the opinion of Circuit Judge Sobeloff indicated below, the *Calbeck* case dealt specifically only with the phrase of the Longshoremen's Act, precluding federal coverage where a state act could validly apply. But the language of *Calbeck* and its philosophy make broad federal coverage an underlying purpose of the Longshoremen's Act and is the only interpretation consistent with the application as intended by Congress.

At pages 126 and 127 of *Calbeck,* the Court stated:

> "Congress brought under the coverage of the [federal] Act all such injuries [i.e., on navigable waters] whether or not a particular one was also within the constitutional reach of a state workmen's compensation law."

In *Holland* v. *Harrison Bros. Drydocks, etc.* (5th Cir. 1962), 306 F. 2d 369, 373, footnote 4 states that not only the locality is important but also "the nature of the work".

The footnote further states:

> "• • • The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the history of the Act indicates that its *underlying purpose* was to *embrace the admiralty jurisdiction whatever that might be.*" (Emphasis added.)

Once accepting this clear proposition, it is only necessary to establish how far "ashore" the admiralty jurisdiction extends.

By statute, the Admiralty Extension Act, 46 U.S.C., Sec. 740 (1948), provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."

The meaning of "caused by a vessel on navigable waters" has authoritatively been held to mean that even a dockside injury is covered by maritime law where the injury arose out of some "service to the ship".

The Supreme Court so held in *Gutierrez* v. *Waterman Steamship Co.*, 373 U. S. 206 (1963), and rejected the contention that the injury must be caused by the vessel or ship's appurtenances. In *Gutierrez,* a longshoreman was injured on a wharf when he slipped on beans that had spilled out of bags being unloaded from the vessel, and the Court held that this dockside accident was within the maritime jurisdiction and subject to the doctrine of unseaworthiness.

Justice White, speaking for the Court made it clear that the impact on dockside was within the ambit of maritime

jurisdiction because of the Extension of Admiralty Jurisdiction Act, and stated:

> "Respondent contends that it is not liable at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C., Sec. 740, swept it away. * * *"

From *DeleBardelben* to *Calbeck* to *Gutierrez,* it is demonstrated that the Longshoremen's Act is co-extensive with admiralty jurisdiction, and that admiralty jurisdiction extends even to dockside where a worker is injured because of an activity related to a vessel and particularly when caused by direct contact with a vessel or its appurtenances.

This Court has never expressly held that a pier injury is cognizable under the Longshoremen's Act. The closest case—and one of the most brilliant decisions in the field—is *Michigan Mutual Liab. Co.* v. *Arrien,* 233 F. Supp. 496 (S.D.N.Y., 1964), aff'd (2d Cir. 1965) 344 F. 2d 640, cert. den. 382 U. S. 835. The facts of this case are of paramount importance because, in some quarters, they have been misconstrued.

> "At the time of the accident, he was working on a 'skid'—a removable platform approximately six by ten feet—which was attached to the dock. It extended out over the water and towards the ship some twenty to twenty-five feet below the deck, its outer edge short of the side of the vessel. The skid was necessary because the stringpiece of the dock was too narrow. . . .
>
> "The skid was attached to the pier by two overhead cables, extending from the superstructure of the pier to its offshore corners. The onshore side of the

skid was secured to the stringpiece of the dock by three angle irons affixed to the stringpiece." (497)

The skid extended the working surface of the pier. In no sense was it a gangway or gangplank. It did not enable passengers, longshoremen or other workmen to go back and forth between the pier and the ship. It was exclusively an extension of the pier, and not of the ship.

The jurist epitomized the basis for his upholding an award under the Act in favor of a longshoreman injured while working on the skid in this one pregnant sentence:

> "It thus appears that 'upon the navigable waters' is to be equated with 'admiralty jurisdiction.'" (501)

In commenting on the Admiralty Extension Act, he observed, 502:

> "The basis upon which the Extension Act and the Longshoremen's Act rest is the same—the admiralty jurisdiction of the United States; and both Acts must be understood to have expanded pari passu with it. Any departure from this view would compel the conclusion that the Longshoremen's Act was to be frozen to the admiralty jurisdiction of the United States as it was understood at the time of its enactment in 1927, a view rejected by the Supreme Court in the *Calbeck* case by clear implication."

Another case underscoring the expansive influence of the Admiralty Extension Act upon not only traditional Admiralty concepts but also on the Longshoremen's and Harbor Workers' Act is *Interlake Steamship* v. *Nielsen*, 338 F. 2d 879 (6th Cir., 1965), cert. den. 381 U. S. 934. A shipkeeper drove his car off the end of the dock where his vessel was berthed and died of a fractured skull sustained on impact with the frozen waters of Lake Erie. The widow was granted an award by the Deputy Commissioner but had

it taken away by the District Court. The Court of Appeals reversed and reinstated the benefits.

Judge Edwards wrote:

> "While the Admiralty Extension Act of 1948 obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act, it did serve to make clear that admiralty jurisdiction could extend to damage caused on land by maritime events, although early case law had held to the contrary. (See *Cleveland Terminal & Valley R.R. Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316 (1908); *State Industrial Commission of New York* v. *Nordenholt Corp.*, 259 U. S. 263 (1922))" (882), and also:
>
> "It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect of *Calbeck* have all pointed in the direction of expanding the boundaries of admiralty jurisdiction toward land." (882)

Very soon after its enactment, the Admiralty Extension Act was considered to be a clarification of jurisdiction which had always existed, although not always exercised.

Strika v. *Netherlands Ministry,* 185 F. 2d 555, 558 (2d Cir., 1950), cert. den. 341 U. S. 904.

The Act was even applied retroactively. *U. S.* v. *Matson Nav. Co.,* 201 F. 2d 610, 614 (9th Cir., 1953) (property damage to a federally owned dike).

The reasoning above has allowed recovery for seamen ashore when injured in the service of the ship under the Jones Act.

In *O'Donnell* v. *Great Lakes Dredge and Dock Co.* (1943), 318 U. S. 36, a seaman was injured on land during the repair on a gasket connection to a land pipe used in discharging a ship's cargo.

A handyman who assisted in navigation of a dredge was injured in a shed on shore due to an explosion in a coal stove while he was placing lamps from the dredge in the shed. Recovery was sanctioned under the Jones Act in *Senko* v. *LaCrosse Dredging Corp.* (1927), 352 U. S. 370.

The most far-reaching case is, of course, *Hopson* v. *Texaco, Inc.* (1966), 15 L. Ed. 2d 740. In that case two ill seamen in a foreign port were being taken to the United States consul in a taxi cab procured by the ship's master. The cab driver was in a collision, through his negligence. One seaman was killed and one was injured. The taxi service was held to be an "agent" of the shipowner, and recoveries were allowed against the shipowner under the Jones Act.

Accord:

Voris v. *Eikel* (1953), 346 U. S. 328.

In addition, we have the long and still vital history of the "Twilight Zone" cases before us. Ever since 1942 in *Davis* v. *Department of Labor and Industries,* 317 U. S. 249, the Supreme Court has held that wherever there is doubt in applying state as opposed to federal compensation acts in maritime situations, the *tribunal chosen by the claimant* has a presumption of valid jurisdiction. *Davis* states:

> ". . . the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side."

Davis has been interpreted as ". . . a revolutionary decision deemed necessary to escape an intolerable situation and as designated to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way . . ."

Moores' case (Sup. Mass., 1948), 323 Mass. 162, 167, 80 N. E. 2d 478, 480, aff'd (1948), 335 U. S. 874, *sub nom. Bethlehem Steel Co.* v. *Moores.*

The *Calbeck* case (1962), 370 U. S. 114, still makes clear that in any doubtful area the claimant may elect his remedy, and that the Twilight Zone rule still holds.

Respondents would undo all the practical solutions brought forward by the *Davis* case, and applied since 1942.

II. The Longshoremen's Act Applies To Maritime Contracts Of Employment On Man-Made Structures On Or Above Navigable Waters.

Admiralty jurisdiction extends to all damage or injury occurring during the performance of a maritime contract, including contracts of ship loading and unloading and repair, even though the injury involves piers and wharves over navigable waters.

As indicated in Point I, it is the contractual maritime jurisdiction which allows Jones Act recovery for crew members injured ashore through the negligence of their employer or agents of the employer and for unseaworthiness recoveries by longshoremen injured on docks.

The Longshoremen's Act is based on the New York Workmen's Compensation Act. Because the New York Act regulates the employment contract, it even applies to employees injured in other states so long as New York has an interest in the employment contract.

Baduski v. *S. Gumpert Co., Inc.,* 277 App. Div. 591, 102 N.Y.S. 2d 297, App. dism. 302 N. Y. 702.

Cases in Point I demonstrate the applicability of land-based injuries in conjunction with repair work on drydocks and adjacent land areas. These cases apply to the case at bar since a pier over water is even more "maritime"

than land areas near marine railways. Application of the Longshoremen's Act is more apt for areas "over" water than land areas for which relief has been granted.

An accident on a pier or dock built above navigable water is "upon" navigable waters.

As demonstrated above, the Supreme Court has allowed recovery under maritime law for injuries caused by unseaworthy vessels and appurtenances where the impact is on a dock "not remote" from the offending cause (*Gutierrez*).

The same grant of power to Congress by the Constitution delimits the reach of the Jones Act and the Longshoremen's Act. Where an injury occurs because of a vessel-connected activity the scope of both these federal statutes extends and grants a remedy.

Since the Supreme Court has seen fit to allow damage actions under maritime law for dock injuries, there is no impediment for the application of the Longshoremen's Act to the same injuries.

The so-called dry-dock cases reenforce the admiralty jurisdiction over land areas involving maritime pursuits; the federal Act has been applied universally.

Maritime workers injured on a "drydock" are specifically covered by the Longshoremen's Act as well as those who work at least in part upon navigable waters.

33 U.S.C., Sec. 902(4); 903(a).

A "drydock" included a marine railway whereby a vessel is drawn from the water onto land.

Avondale Marine Ways, Inc. v. *Henderson* (1953), 346 U. S. 366.

To make this meaningful, the land adjacent to a marine railway is within the geographical and functional scope of

the Longshoremen's Act. This has been the consistent view of the Court of Appeals.

Holland v. *Harrison Bros. Drydock etc.* (5th Cir. 1962), 306 F. 2d 369, 372, and *Maryland Casualty Co.* v. *Lawson* (5th Cir. 1939), 101 F. 2d 732, 733, cited with approval in the *Avondale Marine Ways* case.

A "building way" injury has also been held covered by the Longshoremen's Act. A building way is on land and used for new ship construction, but the outermost end extends into the water for the launching of a completed vessel. The "building way" was held to be sufficiently within the term "dry dock" to allow recovery for a workman under the Longshoremen's Act in *Port Houston Ironworks Inc.* v. *Calbeck* (S. D. Tex., 1964), 227 F. Supp. 966.

A dock or pier is demonstrably within the admiralty jurisdiction when a maritime worker is injured by ship's equipment. This is a reasonable and common-sense approach.

> "A wharf is a structure on the margin of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded. Hence waters of sufficient depth to float vessels is an essential part of every wharf. *A wharf cannot be defined or conceived except in connection with adjacent navigable waters.*" (Emphasis supplied.)
>
> *Langdon* v. *City of New York* (1883), 93 N. Y. 129, 151.

Compensation acts in general, and the Longshoremen's Act in particular are to be liberally construed in favor of coverage.

Many decisions involving the Longshoremen's Act discuss this principle of statutory construction. *Reed* v. *The Yaka* (1963), 373 U. S. 410, restates this proposition:

> "We have previously said that the Longshoremen's Act must be liberally construed in the conformance

with its purpose, and in a way which avoids harsh and incongruous results."

The federal interest in piers and docks is also shown by the fact that piers and wharves must be recommended and approved by federal authorities. Title 33, Section 403, makes it unlawful to build any "wharf, pier . . ." except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. Section 406 establishes substantial fines (up to $2,500) and/or imprisonment for violations.

The section prohibits "any obstruction" which is not authorized " to the navigable capacity of any of the waters of the United States . . .".

The national concern is with the effects of structures on navigable waters, and not only on the objects navigating in the waters.

A federal interest in navigable waters is not withdrawn by placing man-made structures on or over such waters.

United States v. *Appalachian Power Co.* (1940), 311 U. S. 377, 408, 409.

Economy L. & P. Co. v. *United States* (1921), 256 U. S. 113, 118, 124.

Impact on a dock or pier has been the basis for recovery under the federal Longshoremen's Act where the employee was thereafter propelled into the water.

Interlake S.S. Co. v. *Nielsen* (6th Cir. 1964), 338 F. 2d 879, cert. den. 381 U. S. 934.

Michigan Mutual Liability Co. v. *Arrien* (2d Cir. 1965), 344 F. 2d 640, cert. den. 382 U. S. 835 (injury on a "stage" of skids extending over the water).

The mere fact that the injured party subsequently went into the water should not be decisive of coverage of the

Act where the initial injury was on the dock or pier; if the injury was in maritime employment when it occurred on the pier in these cases it should also be applicable to the case at bar.

If on the other hand an artificial distinction is made between what is "on" and what is "over" navigable water then airplane accidents would be excluded from coverage by the Death On The High Seas Act. But in all logic, such deaths including explosions in airplanes in flight and the like are covered by the Death On The High Seas Act.

D'Aleman v. *Pan American World Airways* (2d Cir. 1958), 259 F. 2d 493.

The word "upon" is susceptible of an interpretation which not only means "on" but "over" and "above". National jolicy has been established concerning structures which are "over" and "above". A remedial statute which has been construed to go to the limits of federal concern would by both purpose and common sense make the Longshoremen's Act applicable to the situation in this case.

In the cases at bar, the facts support the broad view of national interest. The areas below the piers in question here were in fact navigable by boats and by any reasonable standard the piers were over, above, or if you will "on" navigable water. They certainly were over water which had once been and in the future could be open to all types of navigation.

This Court has never definitively decided that an injury on a man-made structure adjacent to ship loading activity is precluded from recovery under the federal Act. It is respectfully submitted that the legislative history of the Act sought this application; it is consistent with the jurisdiction of the Congress over such activities, and the Act presumes coverage of the Act in a borderline activity (Sec. 920).

The decision below (footnote 7) in discussing the legislative history of the Act makes it clear that the House

thought it was meant to cover all maritime workers within the federal jurisdiction. The Senate Report mentioned is more restricted in its language; but it alludes to a mistaken idea of what the maritime jurisdiction even then entailed. The Senate's wording mistakenly assumes that the *Jensen* case limited federal maritime jurisdiction to the water's edge. As Point I illustrates, *Jensen* attempted to limit a *state's* power to the water's edge but not federal power.

The legislative history of the Act in 1926 and 1927 indicates that maritime coverage was the purpose of the Act, and that the Act was to be applied as far ashore as the maritime activity itself extended. If navigable waters are involved in a broad, common-sense definition, the employee has an election to come under the federal Act.

Calbeck v. *Travelers Ins. Co.* (1962), 370 U. S. 114. *Holland* v. *Harrison Bros. Dry Dock, etc.* (5th Cir. 1962), 306 F. 2d 369, 372, 373.

From the very beginning of the controversy over federal and state jurisdiction in *Southern Pacific Co.* v. *Jensen* (1917), 244 U. S. 205, 217, it was made clear that a maritime worker whose "employment was a maritime contract" and who received maritime-connected injuries was within the federal concern. See also *Atlantic Transport Co.* v. *Imbrovek* (1914), 234 U. S. 52, 62.

As indicated in Point I, both the *Jensen* case and *O'Donnell,* decided *prior* to the Admiralty Extension Act allow federal laws to be applied ashore. The maritime law for instance, from its earliest beginnings, provided maintenance to crew members and had other applications divorced from restricted notions of a vessel's location afloat.

As stated in *O'Donnell* (pp. 42, 43):

> "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance

> and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

In *O'Donnell,* the seaman was on shore when he was injured.

Swanson v. *Marra Bros., Inc.,* 328 U. S. 1, does discuss the federal Act and its legislative history, but the thrust of the decision is merely to clarify (1) that the Jones Act was not to be applied to a longshoreman who was not a member of a ship's crew, after passage of the Longshoremen's Act, and (2) that a state compensation remedy would lie for injury to a longshoreman for "land torts". But in fact, the Court was not asked to pass upon the question whether a longshoreman injured on a pier could *elect* federal over state compensation rights.

Waterfront workers injured by shore-based equipment used to load and unload ships are covered by a warranty of seaworthiness. This was so held in *Huff* v. *Matson Navigation Co.* (9th Cir. 1964), 338 F. 2d 205, cert. den. 380 U. S. 943; *Spann* v. *Lauritzen* (3rd Cir. 1965), 344 F. 2d 204, cert. den. 382 U. S. 1000, and *Deffes* v. *Federal Barge Lines, Inc.* (5th Cir. 1966), 361 F. 2d 422.* *Deffes* so held because (p. 425):

> "Loading and unloading is clearly held to be 'work of the ship's service' ", citing *Seas Shipping Co.* v. *Sieracki* (1946), 328 U. S. 85, 89; *Crumady* v. *The Joachim Hendrik Fisser* (1959), 358 U. S. 423, 427 and *Italia Societa* v. *Oregon Stevedoring Co.* (1964), 376 U. S. 315, 323.

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*A contrary result was decided in the Sixth and Second Circuits.

All federal rights including federal compensation rights should logically be given to those injured by ship's equipment while working in the ship's service.

III. Application Of The Longshoremen's Act To The Situation At Bar Would Apply A Maritime Remedy To Men Injured By Ship's Gear on Structures Over Water.

Affirmance of the Court below need not create paradoxes in applying the Longshoremen's Act nor open up new areas of controversy.

The cases here can be affirmed on a rather narrow ground. All the employees were injured by ship's gear while serving the ship, and all were on areas constructed over the navigable waters.

Affirmance need not lead to a ruling that all injuries even by men not serving a ship must be covered by the federal Act if it occurs on land areas adjacent to water or on a pier. The Court could deny a very general application and still apply the federal Act to the cases before it on the facts here presented.

In twilight areas, the law still has elasticity enough to protect a claimant from being the victim of uncertainty.

An affirmance would also bring justice in cases where the federal Act had been held inapplicable, we believe, improperly. For instance, in *Travelers Insurance Co.* v. *Shea,* 382 F. 2d 344 (5th Cir. 1967), cert. den., *sub nom. McCullough* v. *Travelers Insurance Co.,* 389 U. S. 1050, a worker was injured on a floating work barge which rose and fell with the movement of the waters and which was adjacent to and a necessary part of a floating drydock. The Circuit Court felt impelled to rule these floating barges an extension of land, and denied federal coverage.

The Longshoremen's Act was not passed to create an iron-clad boundary between state and federal territory. The Act's passage was meant to do away with the need to decide the boundaries of power. *Calbeck* discussed this and reiterated the *Davis* case policy of a Twilight Zone allowing overlapping coverage so that a claimant need not elect between remedies at his peril. (*Calbeck*, p. 128, citing *Davis* v. *Department of Labor & Industries*, 317 U. S. 249.)

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION,

By Paul S. Edelman,
Attorney for *Amicus Curiae*,

Dated at New York, New York, this 5th day of March, 1969.

Certificate.

This is to certify that on the day of March, 1969, copies of the above *amicus curiae* brief were served by mail on Hon. Erwin C. Griswold, Solicitor General, United States Department of Justice, Washington, D. C. 20530; Randall C. Coleman, Counsel for Petitioner, Nacirema Operating Co., Inc., 1600 Maryland National Bank Building, Baltimore, Maryland 21202; William B. Eley, counsel for Petitioner, Liberty Mutual Insurance Company, 1000 Maritime Tower, Norfolk, Virginia 23514; E. D. Vickery, Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, and Francis A. Scanlan, Kelly, Deasey & Scanlan, 926 Four Penn Center Plaza, Philadelphia, Pennsylvania, counsel for National Maritime Compensation Committee; Ralph Rabinowitz, 1224 Maritime Tower, Norfolk, Virginia 23510, counsel for Respondent Albert Avery; John J. O'Connor, Jr., The Law Building, 425 St. Paul Street, Baltimore, Maryland 21202, counsel for Respondents William H. Johnson and Julia T. Klosek.

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